

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GREGORY THOMAS BERRY, et al.,

v. Plaintiffs; Criminal Action

3 : 11CV754

LEXISNEXIS RISK & INFORMATION
ANALYTICS GROUP, INC., et al,

Defendants.

April 19, 2013
Richmond, Virginia
10:00 a.m.

PRELIMINARY APPROVAL OF SETTLEMENT HEARING

BEFORE: HONORABLE JAMES R. SPENCER
Chief United States District Judge

APPEARANCES: LEONARD A. BENNETT, ESQ.
MICHAEL A. CADDELL, ESQ.
JAMES A. FRANCIS, ESQ.
DALE W. PITTMAN, ESQ.
CYNTHIA B. CHAPMAN, ESQ.
MATTHEW J. ERAUSQUIN, ESQ.
Counsel for Plaintiff

RONALD I. RAETHER, JR., ESQ.
JAMES F. McCABE, ESQ.
DAVID N. ANTHONY, ESQ.
Counsel for Defendant

JEFFREY B. KULL
OFFICIAL COURT REPORTER

1 P-R-O-C-E-E-D-I-N-G-S

2 THE CLERK: Case Number 3:11CV754: Gregory
3 Thomas Berry, et al., versus LexisNexis Risk & Information
4 Analytics Group, Inc., et al. The plaintiffs are
5 represented by Leonard Bennett, Michael Caddell, James
6 Francis, Dale Pittman, Cynthia Chapman, and Matthew
7 Erausquin. LexisNexis is represented by Anthony Raether,
8 James McCabe, and David Anthony. Are counsel ready to
9 proceed?

10 MR. BENNETT: Plaintiffs are, Your Honor.

11 MR. ANTHONY: Defendants are, Your Honor.

12 THE COURT: All right. We are here on a joint
13 motion for preliminary approval of the proposed
14 settlement. I'll hear from the parties in any order that
15 you prefer.

16 MR. BENNETT: Good morning, Your Honor. May it
17 please the Court. If the Court please, the plaintiffs'
18 preference, and I think the parties' preference, would be
19 I would provide just a brief overview, our co-lead
20 counsel, Michael Caddell, would carry the heaviest weight
21 of the presentation for the plaintiffs thereafter, and
22 then I understand the defendants also wish to speak.

23 THE COURT: Sure.

24 MR. BENNETT: Judge, this is a settlement under
25 the Federal Fair Credit Reporting Act. It is, and I have

1 had a lot of opportunities to settle, it is uncommon that
2 I can do more than just pass money to my clients. In a
3 circumstance like this, we have done that, but I think to
4 a degree that professionally is what I hope one of my
5 greatest accomplishments is being part of a team that has
6 negotiated a seachange in the industry-leading product, a
7 product that had, until the settlement, fought ferociously
8 to avoid governance by the Fair Credit Reporting Act. It
9 is the dominant, the mark leader in this space which is
10 providing personal non-credit information on all of us.
11 Every one of us in this courtroom, were we not excluded by
12 the class definition like lawyers and judges are, would be
13 a class member and would benefit from this change.

14 We now will be able to learn at no cost to us
15 what is kept in our files. We will be able to dispute
16 what we think to be very often extensively-used
17 information. It is used by debt collectors, used in the
18 insurance industry. It is used if you go to a cash
19 register and try to use a credit card. Often,
20 information, although you don't know it, is being used to
21 verify your identity. And the remarkable part of this is
22 not simply that it will now be governed by provisions
23 under the Fair Credit Reporting Act regarding accuracy,
24 your right to make disputes and that type of thing, but I
25 think the most important, it is for free. All of the

1 class members and all of us will be able to learn exactly
2 what is maintained about us. We will be able to influence
3 the database in a way that previously we could not. I
4 cannot underestimate how prevalent the Accurint product is in
5 the industry. It is by far the largest, most heavily-used
6 in almost all aspects of our life system.

7 The team that we have put together, just to tell
8 Your Honor, while we tend in our firm to litigate more
9 lean than some, this is a case, however, where this is
10 the -- you just sort of have the top of the pyramid of
11 lawyers that have worked the case. There have been
12 probably three times this number that have actually worked
13 for the plaintiffs. And it occurred, much like this
14 litigation occurred, because of the unification of
15 multiple cases into your docket, into this case at this
16 time with this unified team. Three different teams,
17 multiple cases in multiple venues that have been
18 litigating this issue since 2008. Your Honor actually had
19 in the GRAHAM v. LEXISNEXIS cases a couple of years ago
20 Judge Dohnal's attempt to work out and resolve that case,
21 then unsuccessfully.

22 But you have for our team, Your Honor, my firm:
23 Mr. Erausquin from our Alexandria office, my partner is
24 here as I'm here. You have from Caddell & Chapman in
25 Texas the two named partners, Michael Caddell and Cynthia

1 Chapman, who are in this field All Stars. Jim Francis,
2 his team in Philadelphia would be, I don't want to
3 disparage him by saying this, but he would be comparable
4 to our firm in the magnitude of the litigation they do out
5 of Philadelphia. In this circumstance, Judge, you have,
6 putting this case aside, of the top ten Fair Credit
7 Reporting Act class outcomes in the country, I think you
8 have about seven or eight out of the ten covered with the
9 lead counsel in those respective cases. And we think it
10 is a formidable, it is an informed team, and I think, very
11 importantly, it is a very principled team.

12 Second, Judge, the other point in overview is
13 just to provide the Court a highlight, as we did in the
14 papers, of the path through mediation. This Court, our
15 docket generally, depends on good faith efforts by the
16 parties to try to resolve a case. And that has been the
17 effort on the part of the plaintiff. And based on the
18 history of the litigation, and often not personal
19 relationships, but the litigation relationships were very
20 contentious between the parties, but both sides have been
21 trying to resolve the case for a while.

22 It began in 2009 with a presentation of a very
23 detailed PowerPoint when LexisNexis general counsel and
24 chief litigation in-house counsel flew into Newport News
25 and we sat and worked in the afternoon to try to outline

1 for them the injunctive concerns that we then had. We
2 discussed this briefly at a lunch up in Washington prior
3 to that. It then followed with an all-attorney meeting
4 with Mr. McCabe from the San Francisco office of Morrison
5 & Foerster and all of this team meeting in Philadelphia,
6 again discussing the practice changes, the procedure
7 changes, and our substantive arguments as to why they
8 should be Fair Credit Reporting Act-governed. That was
9 followed with an all-hands-on-deck meeting in New York
10 City at Morrison & Foerster's office in New York with all
11 the primary management of LexisNexis there and again this
12 same team on the side of the plaintiffs and the
13 defendants.

14 After that, Judge, we were unable to resolve the
15 practice changes. Those were the biggest obstacles. And
16 we filed the newest of these cases, which is this 2011
17 docket that's before you now. Your Honor assigned it to
18 Judge Lauck who oversaw the settlement process. But in
19 that interim, she oversaw two mediators who were involved:
20 Judge Dohnal, who worked some of the local mediation work,
21 and one of the nation's top mediators, a gentleman named
22 Randy Wulff, in Oakland. He is at that stage of his
23 career where he does not have to travel. So we all had to
24 travel to him, which we did. We did that on three or four
25 occasions in Oakland, multi-day mediations, again, all

1 hands on deck, and we worked through as much as we could.

2 We still had obstacles. Again, the problem, I
3 think the defendant would have paid the dollars. That's
4 not an issue. It was the defendants' resistance to the
5 practice changes that we think are at the core of this
6 outcome. And Judge Lauck then oversaw that throughout the
7 fall and late summer of 2012. We then met in Houston,
8 then also Mr. Anthony and I flew down to Ft. Lauderdale or
9 nearby, and we went straight to the hotel and worked
10 through a number of these additional changes with some of
11 the management of LexisNexis and the lawyers as well.

12 That was followed, once we believed that we had
13 reached a deal, with our efforts to mediate and vet this
14 outcome thoroughly before Magistrate Judge, Judge Lauck,
15 who had been charged with overseeing this mediation
16 process. These parties all put together their PowerPoint
17 presentations, a couple of boxes, bankers' boxes of the
18 records and documents and pleadings in the case to Judge
19 Lauck, who did, and the Court obviously has great respect
20 for Judge Lauck, but this one should earn some notches in
21 her belt. She certainly earned some battle scars with
22 this effort. She analyzed the settlement. It was put on
23 with evidence, with declarations, with the full detail of
24 what the changes were to be, with the detail of the cash
25 and the structure of the settlement, even the fees issues,

1 all presented to Judge Lauck over a long afternoon, and
2 she patiently went through it from the bench with the
3 parties essentially running a dry run of what would be
4 this hearing.

5 And at the end of that, after extensive
6 questioning, analysis, and discussion, she rendered her
7 opinion. It was not an R&R. This Court is not bound by
8 that at all. But as Magistrate Judge in charge of the
9 settlement process. And we put her, the text of her words
10 in the settlement papers. She supported the same
11 conclusion that this was a fair and adequate settlement
12 reached through the efforts of the parties.

13 Mr. Caddell will provide, and there really are
14 two settlements and they are both complex, one is
15 conventional, what you would normally see: cash, \$400 or
16 \$500 a class member, no claims, you would just get a
17 check. At the end of that day we would be asking for a
18 percentage fee. There is nothing unusual about that,
19 except it is a pretty large amount of money for class
20 members. Then you have injunctive relief that releases no
21 actual damages. It is the sea change we talked about,
22 implements a lot of these rights. The fee that was
23 negotiated there was after all of the settlement
24 discussions with respect to the class and would be paid
25 entirely by the defendant, a rough estimate in the

1 settlement negotiations of the fee.

2 I've been before Your Honor other times, been
3 before other judges, and my brand is not to come before
4 one of my judges and try to ask for a percentage of making
5 the world a better place. And so while 200-some-million
6 people now can get a free annual report and wouldn't have
7 to pay the \$11.50 that the Federal Trade Commission and
8 now CFPB would now permit to be charged, while there
9 certainly is economic value of a ridiculous order of
10 magnitude, it is not my brand to come before Your Honor
11 and ask for a percentage of something other than cash. In
12 this instance, therefore, we negotiated for the defendant
13 to pay fees for the injunctive relief settlement, and
14 that's what you have before you.

15 Mr. Caddell would be, he is frankly more
16 seasoned than I am, Your Honor, and has come in from, as
17 did all of the non-Virginia lawyers, have come in from out
18 of town. I would suggest that Mr. Caddell is from the
19 University of Virginia, so he has at least some roots
20 here.

21 THE COURT: All right. Mr. Caddell?

22 MR. CADDELL: Thank you, Your Honor. I suppose
23 being more seasoned simply is a polite way of saying I'm a
24 lot older than Len.

25 Judge Spencer, this is really a proud moment for

1 all of us representing the putative classes in this case.
2 This is the culmination of five-and-a-half years of
3 pursuing a goal that at times we thought was unachievable.
4 The numbers that Len spoke of briefly, I think, bear
5 repeating. LexisNexis has records, files, on over 200
6 million consumers in the United States. Within the period
7 encompassed by the class since 2006 to the present,
8 LexisNexis has issued collections reports on over 100
9 million consumers in the United States. And that was done
10 without any notice to the consumers, without any
11 opportunity, at least easy opportunity, to obtain copies
12 of their files. For a while there they were charging --
13 if you requested a copy of your file, you would be charged
14 \$8, without any opportunity to dispute any information in
15 your file.

16 And to further place that in context, when I say
17 reports were issued on over 100 million consumers, the
18 total number of reports, of course, was much greater than
19 100 million, because many consumers were the subject of
20 more than one report. So we are literally talking about
21 something that will affect going forward over 200 million
22 individuals in the United States, and literally will
23 affect hundreds of millions of reports that will be issued
24 over the next few years.

25 It is a remarkable achievement. And it is

1 something that we pursued since 2008. We pursued it first
2 separately, and by separately, I mean Mr. Francis's firm,
3 Francis & Mailman in Philadelphia, they had filed an
4 action there, the ADAMS case. Our firm working with
5 Mr. Bennett had filed the GRAHAM case here in Richmond.
6 We then joined forces to work together and to pursue this
7 goal jointly. It has taken, as Len recited, and I won't
8 go over that again, but it has been five-and-a-half years,
9 multiple, multiple meetings, mediation sessions. We have
10 had the assistance of a nationally-known mediator,
11 Mr. Wulff, who mediated all the property damage claims,
12 for example, arising out of 9-11 and the World Trade
13 Center bombing. It is remarkable.

14 Without going into too much detail, it is in the
15 papers, and of course we are here to answer any questions
16 the Court may have, but the overview is that on the
17 injunctive relief, the collections reports that LexisNexis
18 issued in the past, and that LexisNexis took the position
19 were not covered by the Fair Credit Reporting Act, will be
20 subject to the provisions of the Fair Credit Reporting
21 Act. So the report that will be issued in the future
22 that's called collections decisioning will have all of the
23 rights afforded by the Fair Credit Reporting Act
24 applicable to those reports. Consumers will be able to
25 access their file once a year for free. Consumers will be

1 able to dispute issues in their file and have a
2 reinvestigation done of their file. It is remarkable.
3 There will be notice given, publicized notice, public
4 notice, even though it is a (b)(2) settlement, and of
5 course Rule 23 provides that a (b)(2) settlement, the
6 Court may order notice. We will have notice. There will
7 be national, a national notice campaign, Internet
8 publications. It is estimated by the notice provider,
9 which is Kinsella, the Court may be aware, Kinsella
10 Communications, they are one of the leading notice
11 providers in the country. I've worked with them for some
12 20 years now on various national class settlements. They
13 estimate that they will reach 75 percent of consumers in
14 the U.S. with this notice campaign, and of those 75
15 percent, virtually all of them will have seen the notice
16 at least twice.

17 So this is a remarkable achievement. LexisNexis
18 will then take a portion of the information and create
19 another product called Contact & Locate. And we agree,
20 the Court, I'm sure, is probably aware that the case law
21 makes it clear that the Fair Credit Reporting Act does not
22 apply to reports which don't have what are called the
23 seven characteristics. And in general, the seven
24 characteristics are those which bear on a person's credit
25 worthiness, credit employment -- employment possibilities,

1 things of that nature. So if you are simply identifying
2 someone with a name, address, and like a Social Security
3 Number so that you can simply locate that person, the
4 cases are pretty clear that that's not subject to the
5 provisions of the Fair Credit Reporting Act. We have
6 achieved with LexisNexis, even though it is probably not
7 subject to the Fair Credit Reporting Act, we have achieved
8 some success even with respect to the Contact & Locate.
9 They will provide a copy of that report to consumers upon
10 request, even though they are not obligated to do so under
11 the Fair Credit Reporting Act, and if a consumer has a
12 concern or a dispute with the Contact & Locate Report,
13 they will allow the consumer to place a 100-word statement
14 in their file so that whenever someone pulls the Contact &
15 Locate Report, they will see the consumer's statement up
16 to 100 words in which the consumer can dispute that.

17 The easiest example of when that can be
18 important is when you have a mixed file and you have a
19 misidentification and you have an individual who is
20 associated with phone numbers that actually belong to
21 another individual that may have the same name and he is
22 getting calls, harassing calls or something of that
23 nature. And this will allow that individual to put in his
24 file, "No, you don't understand, the number (505) 667-1212
25 is not my number, that belongs to John Doe in

1 Pennsylvania" or something like that. So this is a right
2 that isn't afforded by the Fair Credit Reporting Act, but
3 we have been able to obtain through this settlement.

4 The Court's task, of course, today is not to
5 issue final approval of the settlement, but simply to
6 determine whether in fact this settlement is within the
7 range of settlements that the Court could possibly approve
8 at the final fairness hearing. I think the injunctive
9 relief settlement is unquestionably within that range and
10 merits the Court's preliminary approval so that we can
11 provide notice and we can have the opportunity for the
12 Court to determine whether final approval should be
13 granted.

14 I would mention that with respect to the, while
15 it is characterized that there is only one settlement
16 agreement, there are actually two classes. With respect
17 to the injunctive relief class, we have negotiated a fee
18 with LexisNexis of five-and-a-half million dollars. That
19 represents the full compensation for the three law firms
20 that have been involved in this for five-and-a-half years,
21 that have devoted -- we have taken discovery, depositions,
22 reviewed documents. It has been a very lengthy process.

23 The value to the class of the settlement, the
24 injunctive relief settlement, if it were put in economic
25 terms, it would be in the hundreds of millions if not

1 billions of dollars, truly. And as Mr. Bennett said, this
2 is not a touchy-feely "I made the world a better place"
3 statement. This is a real statement because of the rights
4 that are afforded under the Fair Credit Reporting Act,
5 which cost money. Those have real quantifiable values.
6 And as a result, when we are talking about a class size of
7 over 200 million individuals, it is easy to understand how
8 the value would be in the hundreds of millions if not
9 billions of dollars.

10 The second settlement is a more straightforward,
11 somewhat more prosaic settlement. And that is, we tried
12 to determine, and of course one of the pernicious problems
13 with having a file, a report that's issued and claiming
14 that it is not subject to the provisions of the Fair
15 Credit Reporting Act, is that the consumer doesn't know
16 that the report has been issued. So actions can be taken
17 with respect to that consumer, adverse actions with
18 respect to that consumer, and there will never be a notice
19 given to the consumer because the position is taken that
20 this report is not covered by the Fair Credit Reporting
21 Act. That will change. But for the past seven years, the
22 seven or eight years covered by this settlement, we don't
23 have a list of anyone that can be determined to have been
24 injured or affected by this settlement in the past. So we
25 thought and tried to come up with a way to identify

1 individuals who may have been affected by this practice in
2 the past. And we hit on two separate types of
3 individuals: Individuals who requested their file from
4 LexisNexis, and individuals who then disputed portions of
5 their file at LexisNexis.

6 It turns out that during the class period, there
7 were about 31,000 people who fit into those two
8 categories. We think that's a very good proxy for people
9 who may have been damaged by this practice in the past,
10 because since no notice is given for you to have requested
11 your file from LexisNexis or to dispute any information in
12 your file, you must have received some indication, either
13 from a bill collector, prospective employer, someone must
14 have given you some information that led you to believe
15 that LexisNexis was issuing a report concerning your
16 credit worthiness or your assets and information.

17 And so for these 31,000 people, we obtained a
18 settlement, a total settlement of \$13.5 million. As
19 Mr. Bennett indicated, that will result in payments to
20 these individuals, even after attorneys' fees, and I'll
21 get to that in just a moment, of about \$300 per person.
22 The reality is, because some people for whatever reason
23 will not cash checks or checks get lost and we have
24 provided for a remailing process to try and get money into
25 the hands of these individuals, the reality is that some

1 individuals will not receive payment and ultimately the
2 balance will go to cy pres. But I think there is a good
3 chance that most of these individuals may get as much as
4 \$400. So somewhere in the range of \$300 to \$400 will go
5 to each of these individuals. They won't have to file a
6 claim. They won't have to fill out a claim form. They
7 will receive notice of the settlement, and if the Court
8 does grant final approval of the settlement, they will get
9 a check. It will be that straightforward.

10 Those are the only individuals, and I think this
11 is very important to note, those are the only individuals
12 that will release their actual, their claims for actual
13 damages as a result of the settlement. So if you are not
14 getting money, you are not giving up your claim for actual
15 damages. Those are the only individuals who will actually
16 give up their claims for actual damages.

17 The 200 million consumers that were covered by
18 the injunctive relief settlement will not give up their
19 claims for actual damages. They will retain all of their
20 rights with respect to actual damages. They will waive
21 only effectively two things: As to the 200 million
22 consumers, they will waive the procedural right to proceed
23 as a class. We feel that we have addressed the primary
24 class issue with respect to that group by obtaining the
25 injunctive relief and obtaining the new structure at

1 LexisNexis. And they will also give up their rights to
2 punitive damages and statutory penalties, but they will
3 retain all of their rights with respect to their actual
4 damage claims.

5 Going back then to the \$13.5 million settlement:
6 A request will be made, the agreement that we have with
7 LexisNexis permits us to ask for up to 30 percent of that
8 common fund as a fee. I'll let the Court know, and I want
9 to put it on the record, that we have discussed this with
10 Judge Lauck and we advised Judge Lauck that we will not
11 ask for 30 percent; we will only ask for 25 percent. And
12 I know that's in line with what courts in this district
13 and the circuit have approved in past cases.

14 I want to mention one other thing, Your Honor,
15 in going back, and I apologize for sort of going back and
16 forth between the two classes. Although again it is one
17 settlement, there are effectively two different
18 structures. But on the injunctive relief settlement, one
19 other thing that I think bears mentioning is that this
20 comes at a significant cost to LexisNexis. Not just the
21 future cost of providing the reports and reinvestigating
22 and changing files to correct errors, but it comes at a
23 significant institutional cost to LexisNexis because they
24 are changing the way they do business. They are going to
25 have to train their customers in how to comply with the

1 Fair Credit Reporting Act. Because LexisNexis is going to
2 make these reports, the collections decisioning reports,
3 subject to the provisions of the Fair Credit Reporting
4 Act, that imposes certain obligations on LexisNexis's
5 customers as well. So they will have to be trained and
6 they will have to enter into new agreements that obligate
7 them to honor the provisions of the Fair Credit Reporting
8 Act.

9 There are computer changes, because changing
10 their reports and separating the data into two separate
11 reports is a mammoth task for LexisNexis. You have in the
12 papers filed in the declaration of Tom Sizer, it was filed
13 under seal so I won't reference the precise information on
14 the record in open court like this, but suffice it to say
15 on the record that it will cost LexisNexis millions of
16 dollars in actual out-of-pocket costs to implement this
17 change. That's a further measure of, I think, the benefit
18 that's being provided to consumers by this injunctive
19 relief change.

20 Your Honor, we have, if the Court agrees to
21 grant preliminary approval, which I think, as I've said,
22 given the standard, I believe is appropriate in this
23 instance, the parties have conferred on a potential
24 schedule. And I think we could provide that to the Court
25 as late as -- I mean as early as this afternoon.

1 THE COURT: All right.

2 MR. CADDELL: Because we have to have sufficient
3 time. The notice campaign for the injunctive relief, as I
4 said, will be by publication. So it will take some time
5 to purchase, make ad buys and set up websites and things
6 like that. So it will take some time before we can
7 implement that. And then given that the notice to the
8 individuals, the 31,000 individuals, would be timed to
9 coincide with the implementation of the notice campaign,
10 the publication notice leading up to then a joint final
11 approval hearing. But as I said, I think we could confer
12 and I think we could give the Court, we've gotten some
13 information from Kinsella Communications concerning ad
14 buys and things of that nature. So I think we could give
15 the Court a proposed schedule later today.

16 THE COURT: All right. Thank you.

17 MR. CADDELL: Thank you. Let me just check with
18 Mr. Bennett. Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. ANTHONY: Good morning, Your Honor. David
21 Anthony from Troutman Sanders. I'm pleased to introduce
22 my co-counsel here, Ron Raether, who is to my immediate
23 right, with the Faruki firm out of Ohio, and to his right,
24 Jim McCabe with Morrison & Foerster in San Francisco. I
25 have been very honored and pleased to work with these two

1 guys who with their firms are two of the preeminent
2 defense counsel firms on the FCRA on a class basis.
3 Mr. Bennett is correct; this litigation is hard fought.
4 Mr. Raether is going to speak to the substantive points,
5 but I wanted to mention two things. Typically when we
6 have cases before the Court and the case gets settled you
7 get a simple call from the Magistrate Judge that says,
8 "The case is settled." Obviously, in this situation,
9 Judge Lauck did a lot more than that. I wanted to make
10 sure, and I know Mr. Bennett said that, but I wanted to
11 reiterate that, her significant efforts here. It was a
12 very complicated case. She was patient, inquisitive,
13 probing, constructive, sort of putting herself in your
14 shoes and asking the right questions to challenge this so
15 this process would go as smoothly as possible. We
16 appreciate it and I want to make sure the Court is aware
17 of that appreciation because she really did yeoman's work
18 here.

19 The second thing, on a personal note, Your
20 Honor, we know the Court's schedule here. We know you
21 gave us latitude. We take that very seriously. We
22 appreciate that this case was complicated. We kept the
23 Court apprised of all of that. The Court provided us with
24 some extensions on deadlines while we had to deal with
25 national mediators and all that kind of stuff. We don't

1 ask for that every single time, but please note that every
2 time we do that we do it for a reason, and we know we have
3 the Court's trust and we appreciate it.

4 THE COURT: I'll put on the record that Judge
5 Lauck was your champion. I was the impatient one, but she
6 kept saying, "Things will be all right after a while," so
7 I went along with it.

8 MR. ANTHONY: We appreciate it, Your Honor.
9 With that, I'll turn the floor over to Mr. Raether for
10 some comments.

11 THE COURT: All right.

12 MR. RAETHER: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. RAETHER: I want to reiterate what
15 Mr. Anthony said and express my appreciation to the Court,
16 and especially Magistrate Judge Lauck, for her patience in
17 helping us to work through, I think, a very contentious as
18 well as having lots of equivalents to running a marathon,
19 not that personally I can say I've done that, but if I
20 thought what it would be like to run a marathon, I think
21 it would be somewhat like the process we have gone through
22 here.

23 Before I get into the items that I intended to
24 talk about, I wanted to make a few housekeeping points,
25 clarify a little bit of what plaintiffs' counsel may have

1 said in their presentation, but obviously the defendants
2 come here in support of this settlement. We worked hard
3 on it. We have applied, I think, creative thinking to try
4 to navigate our clients through what I think was a very
5 difficult and confusing maze, both with respect to the
6 facts as well as the law. I guess first of all, when I
7 was originally introduced, and I apologize to the Court
8 and the Court's personnel that I didn't have a card with
9 me, I have to admit that not being able to bring my
10 electronics with me everywhere I go is somewhat
11 disconcerting for me being a tech nerd. So I left my
12 cards along with my electronic devices outside the
13 courtroom. So I was initially introduced as Anthony
14 Raether. I take that as David's attempt to try to maybe
15 embed me with some of his credibility. But I certainly
16 want to let the Court know that Mr. Anthony has been a
17 great benefit to those of us who don't ordinarily practice
18 in this Court. And we have taken his advice and his
19 counsel at heart in everything that we have done.

20 I guess secondly, Mr. Bennett was talking about
21 the injunctive relief and the definition of the class. I
22 can assure Your Honor as well as anyone who is not
23 included or may not be included in the class definition
24 that our client has not attempted to carve anyone out of
25 the benefits that are going to be provided by the

1 injunctive relief. This is a massive change in terms of
2 how our client takes data, presents it, and makes it
3 available to its users. So obviously, this injunctive
4 relief that our client has agreed to will benefit
5 everyone, not just those who are members of the class.

6 The third thing is, when Mr. Bennett and
7 Mr. Caddell were talking I was reminded of the Hundred
8 Years War. And I won't try to say which side is France
9 and which side is England in that war, but certainly this
10 has been a long and hard fought battle. We obviously
11 believe that the product that was offered by our client is
12 not a consumer report. We feel that when you looked at
13 the circumstances of how it was marketed, sold, presented,
14 the warnings and prohibitions that we had, both within the
15 product as well as within the contracts, kept us out of
16 the definition of consumer report, which I'm sure as Your
17 Honor will recall from all the times we have been before
18 you and the papers that we have presented, that's the
19 heart of the issue that was to be litigated in this case
20 and that we have resolved with this settlement. And I
21 think one point of note is that for the Court to recognize
22 that our client's product is used by law enforcement. It
23 was used to quickly track down the Unabomber. And I think
24 given the events that have happened in our country
25 recently, it is important to note that our client, while

1 sometimes, I think, wrongfully villified, does provide a
2 very important, timely, and useful service to society.
3 And I think that would -- and I think it did resonate
4 during our discussions with plaintiffs' counsel, the fact
5 that our product is used for that purpose.

6 The other point -- that's sort of part of the
7 maze, the factual aspect of it. The legal aspect of it,
8 if you look at the definition of consumer report, even if
9 you were an English major, which I was not, and you try to
10 diagram out that definition, I think that it would take
11 you a long time. It would take you a lot of Tylenol,
12 maybe Motrin, maybe something harder. It is not a very
13 clear statute. It is not very clearly written, especially
14 that aspect of the Fair Credit Reporting Act. In fact,
15 the Third Circuit last -- just this last fall in FUGES, a
16 case pending before the Third Circuit, in fact, made that
17 statement specifically in their order, that the definition
18 of consumer report is not very clear. In fact, in that
19 case, found for the defendant on the issue of willfulness,
20 you know, interpreting exactly the issue that the parties
21 were confronted with here in this case.

22 But I do want to talk about the compromise that
23 was reached because I think hopefully by now Your Honor
24 realizes this was a very contentious, heated negotiation.
25 There was disagreement on the facts; there was

1 disagreement on the law. But like in any settlement or
2 negotiations, you try to find common ground. Fortunately,
3 we had the guidance of Magistrate Judge Lauck, as well as
4 Mediator Wulff, to help navigate the parties and show them
5 a possible path to resolving this complicated case. And I
6 think when you look at what we have presented to Your
7 Honor in the settlement, you will see that we have
8 addressed the issues raised in the complaint. And I think
9 plaintiffs' counsel did a good job of being able to
10 present what that issue was, and it was collections, use
11 of our client's product by the collection market. And
12 that's in fact what we have addressed in the injunctive
13 relief. Taking the product, and I think really providing
14 a shift in the paradigm of how this market has looked at
15 the data. And I think, also, to the benefit of the
16 market, helping to start draw some lines in that gray area
17 of what is within or without the definition of consumer
18 report. And I can tell you that our client and our side,
19 we are very proud of what we have been able to pull
20 together in terms of this injunctive relief. And I know
21 our client is excited about being a market leader to help
22 its customers be more in compliance with the law.

23 As counsel for the plaintiffs in the putative
24 class mentioned, this is going to require an enormous
25 amount of effort. I think that's important in two

1 respects. Mr. Caddell has talked about the cost. So not
2 just the capital, hard cost expenditures, but also the
3 soft costs, the potential issues within the market.
4 Because this is a shift, this is an earthquake within the
5 market. We think that we are on the right side of that
6 fault line. But it is a shift.

7 The other importance of it is the timing. So
8 there are some timing milestones within the settlement
9 agreement as to when events are scheduled to occur, and
10 that timing was well thought through in terms of what's
11 actually feasible, without being too conservative, but
12 those time frames were thought through, there is a reason
13 behind each of them. We negotiated that with plaintiffs'
14 counsel. I'm happy to answer any questions that Your
15 Honor might have about that.

16 I think finally, without question, the
17 settlement does confer a substantial benefit on the class.
18 I think class counsel did a good job both of explaining at
19 a high level what the injunctive relief accomplishes, why
20 we agreed to make a payment to those who submitted a
21 dispute, as well as those who requested a copy of their
22 Accurint report. I'm not going to repeat that. Of
23 course, when you put all that together, coming back to my
24 original point, I think this does address the issues
25 raised in the complaint.

1 I do think, Your Honor, that the settlement is
2 fair and reasonable and adequate. Based on the work that
3 we have done, we think that Your Honor ought to approve
4 the settlement. We have worked hard on the notice
5 program. We think that meets the requirements of 23(e).
6 Your Honor, I'm here at your disposal to answer any
7 questions you might have.

8 THE COURT: I had just a couple. I noticed that
9 you indicated you all could withdraw from the settlement
10 if your insurance company didn't step up and make
11 payments. You know, obviously, nobody wants this to be
12 fragile. So can you tell me something about that, the
13 likelihood that your insurance company will not step up?

14 MR. CADDELL: Certainly, Your Honor. I can tell
15 you that that provision is typical and what we include in
16 class settlement agreements, mainly because of what's at
17 stake and what's at issue. I can also tell you that in
18 going into the mediation, through the mediation as well as
19 at the conclusion of it, we spoke with both counsel as
20 well as representatives of the insurer for our client.
21 There have been no objections. In fact, they gave us the
22 authority both for the negotiations as well as the
23 conclusion of the settlement.

24 THE COURT: All right. That's all I need to
25 know. Thank you very so much.

1 MR. CADDELL: Thank you, Your Honor. I
2 appreciate your time. Thank you.

3 MR. McCABE: Nothing from me, Your Honor.

4 THE COURT: All right. Well, it is clear that
5 there has been a lot of work put into this. I don't think
6 I have any problem with giving preliminary approval. I
7 guess Mr. Caddell suggested that you could have a
8 schedule, a suggested schedule for me so that we can put a
9 date for the final hearing in the order.

10 MR. CADDELL: Yes, Your Honor. In fact, if I
11 might, if the Court would allow us, I think we might be
12 able to resolve that in about ten minutes, and we could
13 then leave it with your Clerk.

14 THE COURT: Sure. Sure. If you all think you
15 can do it that quickly, that would be great. And we might
16 be able to get this out today. All right? Sure. I'll go
17 down and wait to hear from you all. Thank you all very
18 much.

19 MR. CADDELL: Thank you, Your Honor.

20 (Proceedings adjourned at 10:48 a.m.)

21 CERTIFICATE OF REPORTER

22 I, Jeffrey B. Kull, Official Reporter, certify that
23 the foregoing is a correct transcript from the record of
24 proceedings in the above-entitled matter.

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2 _____/s/ _____
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Jeffrey B. Kull,
Official Federal Reporter

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